UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

ROBERTA KARNOFSKY, Plaintiff, v. MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, Defendant.	C.A. No.: 2:14-cv-00949-PMD **MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

SUMMARY

In spite of having no independent medical expert or vocational expert to counter the evidence of total disability offered by Plaintiff's treating physician/surgeon and her vocational expert, the Defendant seeks summary judgment as to all liability to the Plaintiff under her disability policy containing the Own Occupation Rider Endorsement.

Nowhere does the Defendant provide an opinion or proof that the Plaintiff can work as an Anesthesiologist or could earn an income of over 25% of her pre-disability income as an Anesthesiologist (so as to qualify for the payment of full benefits under the partial disability provision of the policy).

Defendant denies benefits for Total Disability advancing a discredited interpretation of the definition of Total Disability, based on language contained in a different policy. Defendant also seeks to avoid partial disability benefits from June, 2012 forward, even though its 30(b)(6) witness conceded that Dr. Karnofsky is partially disabled and that it needs only to determine the amount to pay Dr. Karnofsky for partial disability. [**Dkt. Entry 33-4**, R. Miles Depo. p. 48, ln. 17-25, p. 49, ln. 1-18 and p. 55, ln. 24 – p. 56, ln. 6] To add insult to the injury, Mass Mutual has refused to pay any benefits for disability for these periods while at the same time it has waived payment of the premiums because Dr. Karnofsky was disabled under the policy.[1]

The issues of total and/or partial disability remain to be decided by this Court or at the very least, by a jury. The bad faith issues also remain to be decided by a jury.

FACTS:

Plaintiff adopts the facts as set forth in her Memorandum in Support of Partial Summary Judgment. [**Dkt. Entry 33-1**, p. 1-5, filed July 06, 2015]

ARGUMENT:

1. **Plaintiff is "Totally Disabled" under the terms of the MassMutual policy because it is undisputed she cannot perform the main duties of her occupation as an anesthesiologist. It makes no difference that she can still perform some of the duties.** (Response to Defendant's Memorandum in Support of Defendant's Motion for Summary Judgment Argument III.A.)

Plaintiff adopts the argument regarding the definition of Total Disability set forth in her Memorandum in Support of Partial Summary Judgment. [**Dkt. Entry 33-1**, p. 7-9, filed July 06, 2015]

Mass Mutual's argument that a reading of the definition of Partial Disability mandates the conclusion that Total Disability should be understood to require the inability to perform ALL the duties of ones occupation, advances an interpretation of the policy that is not supported by the policy language. Mass Mutual's entire argument is based on the blatantly false proposition that Partial Disability is defined as the ability to perform "some but not all" of the main duties of one's occupation. Every case it cites and every argument it makes is based on this false supposition.

[1] The record shows that premiums were current through November 17, 2014 and this could only be because the premiums were waived while she was disabled under the policy. (**EX. 20**) The premium history shows premium waivers were provided from November 17, 2010 on. (**EX. 21**). Plaintiff's Exhibits 1-19 are attached to Plaintiff's Memorandum In Support of Partial Summary Judgment, Dkt. Entries 33-3 through 33-22.

Mass Mutual's argument that the "inability to perform 'some, but not all' of his or her important duties does not meet the definition of "Total Disability" because to hold otherwise ignores the "Residual Disability" term in the insurance contract" is disingenuous. [**Dkt. Entry 34-1**, p. 13] This argument presupposes that Partial Disability is defined in Plaintiff's policy as the ability to "do some, but not all" of the main duties of your occupation. But it does not, as the insurance company knows:

> Q. Does the definition of partial disability say anything about the ability to perform some but not all of the main duties of the occupation?
>
> A. No, it does not…
>
> [**Dkt. Entry 33-4**, R. Miles Depo. (Mass Mutual 30(b)(6) witness), p. 49]

Mass Mutual did once sell a policy with such a definition [**Dkt. 33-18**, Conn Mutual Policy], but not to Dr. Karnofsky. Mass Mutual could certainly have employed the same language in Dr. Karnofsky's policy, but did not. Its claim that the definition of Total Disability in Dr. Karnofsky's policy is guided by the definition of Partial Disability in a different policy is a thinly disguised grab at rewriting Dr. Karnofsky's policy to include language contained in another policy, something prohibited by the rules of construction.

The purpose of all rules of contract construction is to ascertain the intention of the parties to the contract. Where the agreement in question is a written contract, the parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof. *Parker v. Byrd,* 309 S.C. 189, 192, 420 S.E.2d 850, 852 (1992). It is not the function of the court to rewrite the contract.

2. Mass Mutual's Motion for Summary Judgment for late notice must be denied because of significant questions of fact regarding the alleged late notice. (Response to Defendant's Memorandum in Support of Defendant's Motion for Summary Judgment Argument III.B. & C.)

a. There is a material question of fact whether the notice was late.

Dr. Karnofsky's policy contains a policy provision regarding the issue of timely notice. It provides that filing "Proof of Disability" must be sent within 90 days of each month of disability claimed or as soon as reasonably possible. It also provides no benefits will be paid for any proof received more than one year "after it was due" as follows:

> Proof of Disability
>
> In order for Us to pay benefits, We must receive within 90 days after each monthly benefit claimed, proof of Disability, and proof of any Loss of Income or any other proof required to substantiate the claim. If it is not possible to send it within 90 days, send it as soon as is reasonably possible. Your claim will not be reduced because of the delay, but We will not accept proof of loss later than 1 year after it *was due*…
>
> [**Dkt. Entry 33-3**, Mass Mutual Policy, page 15 of 27) (emphasis added]

The question here is when the notice was "due". Mass Mutual claims the notice provision contains only one test of when notice is due, namely within 90 days of each claimed monthly benefit and it will not accept proof of loss later than one year after 90 days. Read thusly, Mass Mutual has no duty to pay beyond 90 days and one year, regardless of disability. Dr. Karnofsky maintains that there are alternative tests for when the notice is due, namely within 90 days or "as soon as is reasonably possible". Read thusly, the claim is not barred unless it is filed more than 90 days and one year after it was reasonably possible to file.

Dr. Karnofsky's interpretation should be adopted by the court because it is at least as reasonable as that of Mass Mutual's and is more favorable to Dr. Karnofsky. When a policy may be read in two ways, one favorable to the insured and the other favorable to the insurer, the court must adopt the reading most favorable to the insured.

Moreover, Dr. Karnofsky's interpretation of the provision is consistent with the reading of other statutes of limitation. The South Carolina statutes of limitation provides for example that suit must be brought within a specified number of years from a time a person knows or has reason to know of the right of action. Similarly here, the Proof of Loss must be filed as soon as reasonably possible, but in no event longer than one year beyond the time it is reasonably possible to know of the time for filing.

Additionally, Dr. Karnofsky's reading is in keeping with the case of *Wright v. Unum*, 2001 U.S. Dist. LEXIS 26063, 2001 WL 34907077. The *Wright* policy contained the exact same limitations as the present policy. The court there held that to read the limitation as Mass Mutual would propose would make the "reasonable time notice meaningless and would require the insured to file proof of loss before he knew of a claim under the policy:

> Therefore, the notice provisions in the policies do not require Wright to provide proof of loss before Wright reasonably knew of his loss. Wright's notice of claim was within a reasonable time, and his claim was timely. (*Wright*, supra. p. 3)

Mass Mutual attempts to distinguish *Wright* and urges this Court to apply the findings in *Shealy v. Unum Life Insurance Company of America*, 979 F. Supp. 395 (D.S.C. 1997), aff'd. MassMutual's reading of *Wright* fundamentally flawed. In *Wright*, this court found that, as the Defendant attempts here, proof of loss cannot be merged with notice of claim to create an additional duty before the insured satisfies the notice provision in the policies.

This Court specifically rejected Defendant's argument that Wright did not meet the condition precedent to submit timely proof of claim.

> "All four policies also provide an alternative time within which to provide proof of claim as "after the date of such [or other] loss." "Loss" is not reasonably read as "onset of disability," which would be required under Defendants' interpretation. Wright's claim is for a continuing disability that does not have a specific date of loss. In any event, Wright did not suffer a loss until he attempted to return to practicing orthodontics and was unable, which the evidence shows was in 1998. Furthermore, Wright's claim for a continuing disability can be reviewed and tested by the insurers, which removes the purpose for requiring proof of claim within a specific time.
> The policies' language does not require [13] proof of loss under the circumstances of Wright's claim and does not preclude Wright's claims because of his delayed proofs of claim. Defendants' argument that these provisions created some repose after July 1996 is grounded only in blind application of the provisions to Wright's claims. Defendants' policies do not support their argument for summary judgment on Wright's failure to file timely proof of claim." See, *Wright v. UNUM Life Ins. Co.*, 2001 U.S. Dist. LEXIS 26063, *12-13, 2001 WL 34907077 (D.S.C. Aug. 31, 2001)

Similarly here, Dr. Karnofsky returned to work after her accident in 2007, but her health condition continued to decline. She continued to work and in July of 2011 had her first surgery in hopes that she will be able to return to work full time as an anesthesiologist. When that surgery failed and it became obvious that she will not be able to practice anesthesia, Dr. Karnofsky contacted her agent to inquire about submitting a claim for disability. [**Dkt. Entry 33-11**, R. Karnofsky Depo., p. 48-49]

Lastly, this court analyzed the *Shealy* policies in its *Wright* opinion and found that in *Shealy* the policies required impossibility whereas the *Wright* contract only required reasonableness. See *Wright v. UNUM Life Ins. Co.,* 2001 U.S. Dist. LEXIS 26063, *14, 2001 WL 34907077 (D.S.C. Aug. 31, 2001). "The language in that contract required impossibility, whereas the contracts in this case only require reasonableness." Dr. Karnofsky's policy requires reasonableness and not impossibility and therefore there is a question of fact as to whether the proof of claim notice was timely.

b. Mass Mutual waived it's right to automatically deny the claim due to late notice in the absence of prejudice.

While Mass Mutual argues *today* that it need not show prejudice to deny the claim for late notice, this is not the position it has previously taken. In a letter dated October 07, 2011 [**EX. 22**], Mass Mutual first raised the issue of late notice and linked it to prejudice. It wrote that the prejudice issue could be addressed with an explanation for the delay:

> Please be advised that your delay in providing notice of claim has prevented us from performing a contemporaneous evaluation for a period of your claimed disability, and may prejudice our ability to obtain the medical, occupational, and/or financial information necessary to evaluate past periods of disability.
>
> In view of the delayed notification of claim, please submit a written explanation as to why notice of claim was received approximately fifty-four (54) months after the claimed onset of Partial Disability.

Mass Mutual's request for an explanation of the reason for delay is the best evidence that a delay did not result in an automatic denial of benefits. There would be no reason to ask for an explanation for the late notice if Mass Mutual believed the claim to be automatically barred by reason of the delay.

In a letter dated January 12, 2012 [**EX. 23**], Mykytiuk wrote about late notice. She never asserted the claim was automatically denied because of late filing, instead she wrote that she would process the claim despite the late notice. She writes that payment depends on whether there has been prejudice:

> Despite your delay in providing Notice of Claim and Proof of Disability, we requested and reviewed the available information in order to attempt to evaluate your eligibility for disability benefits as of April 10, 2007. As advised in our letter to you dated October 7, 2011, your delay in providing Notice of Claim and Proof of Disability has prevented us from performing a contemporaneous evaluation for a period of your claimed disability, and may prejudice our ability to obtain the medical, occupational, and/or financial information necessary to evaluate past periods of disability.

March 9, 2012 [**EX. 24**], Mass Mutual again brought up late notice. It did not assert the claim was automatically denied, but explained the delay might have resulted in prejudice, but nevertheless promises to process the claim.

On April 3, 2012 [**EX. 25**], Mass Mutual wrote to the South Carolina Department of Insurance and explained the issues processing the claim. It brought up the question of late notice but did not assert late notice as a basis for denial, instead it only mentioned the late notice might have prejudiced the investigation.

On August 8, 2012 [**EX. 26**], Mass Mutual mentions the issue of late notice again but does not assert the claim is automatically denied because of late notice.

On September 18, 2012 [**EX. 27**], Mass Mutual mentions late notice but does not assert the claim is automatically denied because of late notice, instead it explains that it has processed the claim despite the late notice.

Finally, in a letter dated August 02, 2013 [**Dkt. Entry 33-14**], Mass Mutual once again brings up the issue of late notice. This time it denies the claim, explaining that late notice prejudiced its ability to conduct a contemporaneous review of the claim.

> Based on the information that is presently contained in Dr. Karnofsky's claim file, MassMutual believes that it is reasonable to conclude its rights to conduct a comprehensive, contemporaneous investigation of her claim and make an accurate determination of any benefits for which she may have been eligible have been severely prejudiced. We regrettably are unable to consider disability benefits for any period of time prior to the retroactive time limit of one year and 90 days as specified in the Proof of Disability provision of Dr. Karnofsky's Policy.

Having taken the position that the late notice resulted in prejudice, which justified denial of the claim, Mass Mutual waived its ability to assert it need not show prejudice to deny the claim.

3. **There is a material question of fact whether Mass Mutual has suffered prejudice on account of the alleged late notice.** (Response to Defendant's Memorandum in Support of Defendant's Motion for Summary Judgment Argument III.B. & C.)

Defendant claims that it has been prejudiced by but offers no evidence to support its position. Mass Mutual has produced not one iota of evidence that it has suffered prejudice by reason of the alleged late notice. It has produced no witness or no document that suggests it has been unable to properly evaluate Dr. Karnofsky's claim by reason of any delay in notice.

This court addressed the issue of prejudice in *Wright* and found that when the disability is continuous, there is no prejudice to the insured if the insured complied with the notice requirement as soon as possible. See, *Wright v. UNUM Life Ins. Co.,* 2001 U.S. Dist. LEXIS 26063, *6, 2001 WL 34907077 (D.S.C. Aug. 31, 2001), where the court found that "[o]n these facts, Wright filed notice of claim as soon as reasonably possible in compliance with the notice provisions in the policies. Defendants have offered no evidence that Wright's notice was unreasonably delayed, particularly in light of the circumstances of his covenant not to compete and of his continuing disability. Defendants also offer no evidence of prejudice from Wright's notice of a continuing disability."

4. **Plaintiff has established a "Demonstrated Relationship" between her disability and her "Loss of Income".** (Response to Defendant's Memorandum in Support of Defendant's Motion for Summary Judgment Argument III.D)

Defendant's argument regarding the "Demonstrated Relationship" relates to its refusal to pay benefits for Partial Disability. It presupposes that Dr. Karnofsky is still working at her occupation as an anesthesiologist, which as pointed out above is incorrect. There is no need for the court to consider Defendant's argument if the Court has determined that Dr. Karnofsky is Totally Disabled under the terms of the policy.

However, even if the Court has determined that Dr. Karnofsky continues to work at her regular occupation such that she is not considered totally disabled under the policy, she is nevertheless entitled to benefits under the partial disability provision of the policy. An insured is entitled to benefits for partial disability if she has suffered a loss of income notwithstanding her continued employment at her regular occupation as follows:

> PARTIAL DISABILITY -- The Insured is Partially Disabled if he/she:
> - is suffering from a current Disability;
> - is working at his/her Occupation;
> - has a Loss of Income;"
> - is under a Doctor's care; and -
> - can show a Demonstrated Relationship between the Loss of Income and the current disability.
>
> [**Dkt. Entry 33-3**, Mass Mutual Policy, p. 11 of 27]

Following her injury and her recognition that she was unable to continue with the work she had once done as an anesthesiologist, Dr. Karnofsky worked to establish herself in a new business involving Pain Management and Cosmetic Laser Surgery. Her new business has not been successful and her income has dropped more than 75% [**EX. 28**, MM 02120][2]. Dr. Karnofsky testified that her decision to open a new business was unquestionably due to her inability to perform general anesthesia:

> A. In 2009 when I saw that my condition was making it more and more difficult for me, I felt that I saw the writing on the wall and that I needed to have another plan in place to make a living when I became less and less able to earn a living the way I had been trained to earn a living. And that was when I started researching laser -- the aesthetic laser. And that's why I formed the LLC in 2009.
>
> [**Dkt. Entry 33-11**, R. Karnofsky Depo., p. 126]

[2] At this level of loss, Dr. Karnofsky should be entitled to benefits representing the face amount of the policy even if she were to be considered Partially Disabled since the policy pays 100% of the face value of benefits under Partial Disability if the loss of income exceeds 75%. [**Dkt. Entry 33-3**, Mass Mutual Policy, p. 12-13, 19]

This testimony alone should be sufficient to establish the connection between her disability and her lost income.

Despite this, Defendant refuses to pay any benefits for partial disability because it claims there is no proof of a "Demonstrated Relationship" between her current loss of income and her disability[3]. Demonstrated Relationship is defined by the policy as a substantial factor in producing the loss without intervening causes as follows:

> DEMONSTRATED RELATIONSHIP – With respect to a Loss of Income, the Disability is a substantial factor in producing the loss. A Disability would not have a Demonstrated Relationship to a Loss of income produced primarily by intervening causes which are not related to the Disability.
>
> [**Dkt. Entry 33-**3, Mass Mutual Policy, p. 10 of 27]

Mass Mutual's own admissions establish the demonstrated relationship between Dr. Karnofsky's impairment and her loss of income. Mass Mutual concedes that Dr. Karnofsky lost the income she once earned as an anesthesiologist because of the injuries she received in her car wreck:

> Q. Did Dr. Karnofsky lose the income she used to earn from her work as an operating-room anesthesiologist as a result of the injuries she received in the wreck?
>
> A. Yes, as far as I know.
>
> [**Dkt. Entry 33-15**, B. Mueller Depo., p. 65]

Mass Mutual knows of no factor that intervened between Dr. Karnofsky's injury and her ending her practice of anesthesia:

> Q. But you know that her anesthesia-room work dropped off up until the time she was finally fired?

[3] It's interesting to note that Mass Mutual did pay Dr. Karnofsky benefits for partial disability representing 100% of the face value of the policy for a period of time before it stopped.

> A. That's my recollection, yes.
>
> Q. Is there anything that intervenes between the time she was hurt and the time her work started to drop off before she was fired that contributed to her inability to do the full work?
>
> A. I don't recall.
>
> [**Dkt., Entry 33-15**, B. Mueller Depo., p. 67]

Mass Mutual nevertheless insists that Dr. Karnofsky's loss of income is not the result of her disability, but rather the result of the business Dr. Karnofsky entered *because* of her disability:

> A. That loss sustained from Lowcountry Laserworks does not appear to be the result of a reported disability. It appears, based on the tax returns, to be losses associated with the inception of a business.
>
> [**Dkt. Entry 33-17**, J. Mykytiuk, Depo., p. 104)]

It claims that Dr. Karnofsky could have earned more money had she concentrated her new work exclusively in the field of pain management instead of Cosmetic Laser surgery.

> A. … If she stopped doing the OR work, if she fills some of that time with more pain-management procedures it wouldn't necessarily equate to a 50 percent loss of income, if instead she chooses to do -- start a new business and not earn money because of all of her startup expenses, that does have a mitigating effect on her income.
>
> Q. So what you're saying is that if she took that one day that she had been doing operating-room anesthesiology and did more pain management it might affect her income?
>
> A. Of course.
>
> Q. And then would reduce her partial disability benefits?
>
> A. Reduce or eliminate, yes.
>
> [**Dkt. Entry 33-15**, B. Mueller Depo., p. 68]

Using dizzying logic, Mass Mutual concludes that the decision to open a new Cosmetic Laser business after she became disabled was somehow a factor that "intervened" to impact Dr. Karnofsky's loss of income.

> Q. Now, if her work as an operating-room anesthesiologist accounted for 50 percent of her income and she could no longer do that operating-room anesthesiology as a result of the injury she received from the wreck why isn't she entitled to a 50 percent partial disability benefit, at least a 50 percent partial disability benefit?
>
> A. Because it depends on whether or not the loss of income has a demonstrated relationship to the disability. If she stopped doing the OR work, if she fills some of that time with more pain-management procedures it wouldn't necessarily equate to a 50 percent loss of income, if instead she chooses to do -- start a new business and not earn money because of all of her startup expenses, that does have a mitigating effect on her income.
>
> Q. So what you're saying is that if she took that one day that she had been doing operating-room anesthesiology and did more pain management it might affect her income?
>
> A. Of course.
>
> Q. And then would reduce her partial disability benefits?
>
> A. Reduce or eliminate, yes.
>
> [**Dkt. Entry 33-15**, B. Mueller Depo., p. 68]

The flaw in this reasoning should be obvious. Her impairment caused Dr. Karnofsky's change of careers and loss of income. The fact that her new career is not as profitable as Mass Mutual would like, does not make it the cause of her changing careers.

5. **The Defendant's own investigation as the basis for not paying benefits does not shield it from a bad faith claim as a matter of law.** (Response to Defendant's Memorandum in Support of Defendant's Motion for Summary Judgment Argument III.E.)

The Defendant correctly recounts bad faith refusal to pay first party benefits includes: (1) a mutually insurance contract; (2) refusal by the insurer to pay benefits due under the contract; (3)

resulting from the insurer's bad faith or unreasonable action in breach of the implied covenant of good faith and fair dealing arising in the contract; and (4) causing damage to the insured. *Howard v. State Farm Mutual Automobile Insurance Co.*, 316 S.C. 445, 451 , 450 S.E.2d 582, 586 (1994). This same case also found that the insurer is not entitled to a directed verdict on a bad faith claim when it uses its own investigation as its reasonable basis for denying the claim; or, when it fails to properly interpret its own policy as providing a reasonable basis to deny the claim. *Id.*

In *Howard*, supra., the adjuster denied a personal injury protection benefit claim based on a call he received saying the insured's ankle injury for which he was seeking benefits was due to a chiropractor's manipulation and not form the automobile accident. Also, State Farm received erroneous legal advice on the applicability of case law as to the interpretation of this policy. Neither of these claimed justifications were enough to warrant a directed verdict, which is the same standard for summary judgment to insurer in that case. Consequently, the issue of bad faith properly remained for the jury to decide.

The bad faith tort remedy was recognized in *Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 338-341, 306 S.E.2d 616, 618-619 (1983). This tort remedy was recognized because the insurance business affects public interest and an insured ordinarily possesses no bargaining power and no means of protecting himself or herself from ill treatment by an insurer. "Absent the threat of a tort action, an insurance company can, with complete impunity, deny any claim they wish, whether valid or not. During the ensuing period of litigation following such a denial, the insurance company has the benefit of profiting on the use of the insured's money." *Id.* Consequently, the South Carolina Supreme Court held "… If an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action. Actual damages are not limited by the contract. Further, if he can demonstrate the insurer's actions were willful or in reckless disregard of the insured's rights, he can recover punitive damages.” *Id.*, 279 S.C. at 340, 306 S.E.2d at 619.

The record in Dr. Karnofsky’s case is far more egregious than that the facts found in *Howard* which the Supreme Court ruled created a jury question on the bad faith claim. The Defendant, interpreted Dr. Karnofsky’s policy restrictively as if it contained the more restrictive policy language from other contracts but which were absent from her policy!

In fact, Mass Mutual has pointed to cases interpreting other policies with different terms as supporting its restrictive position in this case. *Howard* supports the finding of sufficient facts creating a jury question on bad faith. See also *Varnadore v. Nationwide Mut. Ins. Co.,* 289 S.C. 155, 158, 345 S.E.2d 711,713 (1986) [Nationwide’s own investigation claimed auto was destroyed by arson did not entitle it to directed verdict on bad faith claim and bad faith finding by Jury was upheld.]

The other cases cited by the Defendant are distinguishable. *Crossley v. State Farm Mutual Insurance Co.*, 307 S.C. 354, 415 S.E.2d 393 (S.C. 1992). [Investigation of an applicant for a health care policy who was diagnosed as having coronary artery disease the day after applying for the policy was reasonable.] Here, Mass Mutual was not investigating any pre-existing disease since Dr. Karnofsky’s policy was in existence since 1994. *Palmetto Ford v. First Southern Insurance Company*, 1993 U.S. App. LEXIS 24481 (4th Cir. 1993). [Insurance carrier’s refusal to defend based upon a valid policy exclusion was not in bad faith.] Here, Mass Mutual’s 30(b)(6) witness conceded Dr. Karnofsky was partially disabled but attempted to defend the failure to pay by lamely offering that his company was trying to determine a payment amount. While it tries to figure out how much to pay, it has managed to avoid any payment from July 2012 to present. Mass Mutual recognized the importance of prompt payment of disability payments:

> Your income isn't just a paycheck. It is usually the primary source of funding for every part of your life. …" [**EX. 20**]

Similarly, Mass Mutual promotes the disability insurance on its website as needed protection for income and for the family's wellbeing. [**EX. 20,** R. Miles Depo. Ex. 6] Knowing that disability insurance plays such a critical role in its insured's lives, makes prompt, fair and reasonable examinations and payments essential. Viewing the record in the light most favorable to the insured, there are questions concerning the manner in which the claim was processed and paid in part and those payments never made.

An insurer in South Carolina may not engage in improper claims practices. South Carolina Code § 38-59-20. While the statute does not provide a private remedy for insureds or claimants, it does identify prohibited claims practices such as failing to adopt reasonable standards for the prompt investigation and settlement of claims; or not attempting in good faith to settle claims in which liability is reasonably clear; or compelling claimants to institute suits to recover amounts reasonably due. These "shall not" commandments are useful in evaluating an insurance carrier's "good faith" obligations under the policy. "[A]ll bad faith actions-including claims based on bad faith processing of claims when there is no breach of the insurance contract-arise out of the implied warranty of good faith and fair dealing." *Oceanwinds Council of Co-Owners v. Auto Owners Insurance Co.*, 241 F.Supp.2d 572, 577 (D.S.C. 2002), [citing with approval, *Tadlock Painting Co. v. Maryland Cas. Co.*, 473 S.E.2d 52, 53 (1996).] A breach of an express insurance contract provision is not a prerequisite for a claim of a breach of a covenant of good faith and fair dealing in handling of claims. *Id.*

It is important to note that Dr. Karnofsky's application for partial disability benefits was never officially denied but merely reviewed over and over again seeking more and more information. An investigation may not be prolonged beyond the point at which the insurer has exhausted all avenues of investigation, even if it has unsupported suspicions regarding the claim. *Wright*, supra., 2001 U.S. Dist. LEXIS 26063, p. 32-33. Whether this bureaucratic war of attrition was proper or not remains for a jury to decide.

6. **There is evidence supporting a claim for punitive damages.** (Response to Defendant's Memorandum in Support of Defendant's Motion for Summary Judgment Argument III.F.)

The Defendant believes its actions in belatedly paying disability benefits six (6) months to two (2) years late is somehow justified. Viewed in the light most favorable to the Plaintiff, the record and common sense do not support such a conclusion. Taking the Defendant's view of the disability contract in a restrictive way and conjuring words that are not present in the policy as a way to justify its position is wrong. Taking the view of the meaning of its policy based on other definitions, not found in Dr. Karnofsky's policy, is not proper under South Carolina insurance law nor is it proper under the general standards recognized in the insurance industry.

Plaintiff's expert, Mary Fuller is a former Vice President of UNUM Provident where she had performed work as a claims examiner, manager of disability benefits and regional supervisor and now independent consultant on insurance industry standards and claim practices. Ms. Fuller reviewed the claim file and evidence in this case and found Mass Mutual had not followed recognized standards in the insurance industry.

> It is my opinion Mass Mutual failed to: fully investigate the relevant and applicable facts of the claim, fairly consider all information obtained, including that which tends to favor claim payment or continuation as well as that which tends to favor claimed declination or termination; consider the interests of its insureds at least equal to its own; promptly and timely pay benefits owed under the policy; know and understand the language and meaning of their insurance policies; and conduct a fair, thorough, and objective review. The violation of those duties constitutes a failure to comply with the good of good faith and fair dealing.
>
> [**EX. 30,** M. Fuller Report, p. 7, **Dkt. Entry 33-16**, M. Fuller Depo., p. 6, 7, 16-17]

These opinions were documented in her report and fully explained in her sworn deposition. [**Dkt., Entry 33-16,** M. Fuller Depo., p. 17-139]

Mass Mutual's failure to ascertain the main duties of an Anesthesiologist to compare what Dr. Karnofsky was capable of doing was wrong and arguably constitutes a breach of the standard practice for processing disability claims as the Plaintiff's expert has determined. [**Dkt., Entry 33-16**, M. Fuller Depo. p. 6-7, 16-17 and 135; **EX. 30**, Fuller Report]. This along with the endless analysis on Dr. Karnofsky's efforts to operate a new venture was not justified by the standard practice and should not have been used to reduce benefits as clearly stated by the Own Occupation Rider. [**Dkt. Entry 33-16,** M. Fuller Depo., p. 23-24]. Also, causing the insured to go through the production process of collecting information from 2007 and earlier only to later claim that the application for benefits was not timely is outrageous. If it were going to reject the claim because of the "late" claim, then it should have done so at the start so the insured could either accept the decision or sue at that time. [**Dkt. Entry 33-16,** M. Fuller Depo., p. 42-43.]

With the admissions of partial disability from July 2010 to July 2011 payment only at the minimum amount (50% of the benefits) due is not supported by the record. Here Mass Mutual admits Dr. Karnofsky's earnings were low enough to meet the threshold amount of disability benefits but not the entire amount. Why not? Because Mass Mutual's claims examiner said so even though the record established that her income was at a loss of more than 75% of her pre-disability income. [**EX. 28**, MM 02120]. This payment was made after finding Dr. Karnofsky totally disabled at the time of her first and second cervical spine surgeries. Mass Mutual's examiner's stated determination for partial benefits from June 12, 2010 to July 11, 2011 "in order to be of service to [her]." [**Dkt. Entry 33-14**, Mass Mutual Letter dated August 2, 2013, p. 3]

The "service" by giving an insured benefits that were due almost two years earlier, arguably are contrary to the general standards of practice for disability claims and violates South Carolina insurance claims standards. Mass Mutual admits Dr. Karnofsky cannot perform anesthesiology in a hospital setting. [**Dkt. Entry 33-4**, R. Miles Depo., p. 55-56]. Plaintiff's expert agreed that she was not able to perform her occupation as an anesthesiologist. [**Dkt. Entry 33-16**, M. Fuller Depo., p. 54-60]. It also found her partially disabled from June 12, 2010 to July 11, 2011 only paying 50% of benefits after the 90 days waiting period, totally disabled from July 11, 2011 to May 9, 2012, and partially disabled from May 10, 2012 to June 9, 2012 paying 100% of the partial disability benefits of $5,625.00/month. It said it was seeking more information from her business ventures to determine what amount of partial disability it would pay. [**Dkt. Entry 33-14,** Mass Mutual Letter dated August 2, 2013, p. 4] Interestingly, there is no medical or vocational expert opinion stating that Dr. Karnofsky could perform the main duties of an Anesthesiologist. The additional information sought by Mass Mutual was regarding her business venture - not any other information on her physical or mental status - which Mass Mutual understood left her at least partially disabled.

The continued effort to use her other venture as a means of delaying, reducing or denying her benefits was not proper under the Own Occupation Rider or at least creates a jury question on that issue.

The gauntlet of forms and record demands are akin to any governmental bureaucracy at its worst. Mass Mutual acknowledged the importance of its disability benefits insurance: "your income isn't just a paycheck. It is usually the primary source for funding for every part life." [**EX. 20**, Annual Statement 10-3-2014]

Delaying and/or effectively denying payments under the disability policy made Mass Mutual money and clearly made the insured more vulnerable due to her lack of income and the rightful disability benefits due her specifically intended to replace a small part of her income. When viewed in the proper light, which at this stage requires the Court to view all evidence and inferences in the light most favorable to Dr. Karnofsky include:

Shifting findings of partial disability at 50% of benefits, then total disability, then partial disability at full benefit from March 2012 to June 2012, to no benefit and endless requests for information to determine what benefits were due. This treatment was irrational and abusive. Dr. Karnofsky could not perform the main duties of an Anesthesiologist and further the record shows that she was not making over 25% of the pre-disability income at, which should have entitled her to monthly benefits of $5,625.00/month from June 2012 forward. [**Dkt. Entry 33-19**]

Other specifications of breaches of the insurance industries practice standards include:

The failure to obtain an Independent Medical Evaluation("IME") or Functional Capacities Evaluation ("FCE") when its own in-house examiner recommended one [**Dkt. Entry 33-16**, M. Fuller Depo., p. 22-23]; the demands of irrelevant information on her new venture, which should not been used to diminish her total disability benefit [**Dkt. Entry 33-16**, M. Fuller Depo., p. 42-43]; the failure to seek her functional capacity from experts instead of attempting to use multiple surveillance which were never justified in the record nor could possibly determine whether Dr. Karnofsky was capable of performing anesthesiology or pain management on any sustained or regular basis [**Dkt. Entry 33-16,** M. Fuller Depo., p. 22-23]; seeking information for 2007 and earlier but ultimately claiming no benefits were due because her claim was too late, needlessly requiring the claimant to compile years of records to prolong the review process. [**Dkt. Entry 33-16,** M. Fuller Depo. p. 42-43; and, **EX. 30**, M. Fuller Report].

Of course, Mass Mutual and its often used expert says otherwise.[4]

Finally, the facts would allow a jury to compare on the actions prohibited by the South Carolina improper claims practices such as not providing prompt investigation and settlement of a claim; or not attempting to settle the claim and pay promptly or requiring the insured to file suit to seek benefits rightfully due; all potential evidence of the breach of the South Carolina standards which could also support a finding of bad faith.

The record at this stage supports sending the bad faith and punitive damage claim to trial for a full hearing on the merits. Again, the whole purpose of a bad faith claim is to give the insured the ability of obtaining actual damages not limited by the contract and if the insurer's actions were willful or in reckless disregard of the insured's rights, punitive damages as well. *Nichols v. St. Farm*, supra., 279 S.C. at 340, 306 S.E.2d at 619. In South Carolina this was deemed necessary for the public in dealing with insurance companies that need to have more at risk than merely the amounts owed with interest. *Id*. This is especially true here.

7. **The right to recover future benefits under a bad faith claim and possibly under a contract claim remains.** (Response to Defendant's Memorandum in Support of Defendant's Motion for Summary Judgment Argument III.G.)

A. Bad Faith.

The whole purpose of recognizing a bad faith tort recovery was to allow a claimant to recover the foreseeable actual damages and punitive damages against an insurance carrier who has acted in bad faith. *Nichols*, supra., specifically adopted the California law on bad faith, which was expressly meant to go beyond the conventional contract recovery. *Nichols*, supra., adopting *Gruenberg v. Aetna Inc. Co.*, 9 Cal.3d 566; 108 Cal. Rptr. 480; 510 P.2d 1032 (1973) and as of 1983, had been adopted in over 25 states. *Nichols*, 279 S.C. at 338-340, 306 S.E.2d at 618-619.

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[4] Barbara Mueller has been hired by Mass Mutual in the past and provided opinions defending its actions but she could not recall the specific number of times. [**Dkt. Entry 33-15**, B. Mueller Depo., p. 8]

Furthermore, the California courts specifically recognized compensatory damages under a bad faith claim may include lump sum award of the present value of future benefits.[5] *Egan v. Mutual of Omaha Inc. Co.*, 157 Cal. Rptr. 482, 598 P.2d 452 n. 7 (1979). Moreover the California Supreme Court found that its precedent restricting damage to accrued benefits in a disability insurance (breach of contract case) did not prevent a jury from awarding future policy benefits under the bad faith cause of action. In response to the insurance carrier's argument against future damages the California Supreme Court stated:

> We have never held, however, that future policy benefits may not be recovered in a valid tort cause of action for breach of the implied covenant of good faith and fair dealing, nor does defendant offer any compelling reason for extending *Erreca* [a 1942 case allowing only recovery of accrued benefits] to such actions. Thus, in applying to these facts the general rule for fixing tort damages …, the jury may include in the compensatory damage award future policy benefits that they reasonably conclude, after examination of the policy's provisions and other evidence, the policy holder would have been entitled to receive had the contract been honored by the insurer. *Id.*

This Court similarly rejected the argument that future benefits may not be recoverable in bad faith in *Wright v. UNUM Life Ins. Co.*, 2001 U.S. Dist. LEXIS 26063, page 33-34, specifically recognizing and adopting the California Courts reasoning. As a result, this Court followed the correct analysis of bad faith law in allowing future damages to be awarded in a bad faith claim. Other courts have followed this reasoning. See, *Greenberg v. Paul Revere Life Ins. Co.*, 91 F. App'x 539, 541 (9th Cir. 2004) (noting that under Arizona law, an award of future damages is consistent with tort requirements of "direct and proximate causation" "where there is evidence that

[5] The Defendant's claim of pleading deficiencies [**Dkt. Entry 34-1**, Mass Mutual Memorandum in Support of Defendant's Motion for Summary Judgment FN 7 and 8] are not warranted since the Plaintiff has consistently sought all consequential damages as disclosed in discovery including future policy benefits which was disclosed through the Plaintiff's economist, Dr. Oliver Wood; and emotional distress damages as disclosed by Plaintiff's psychologist. Out of an abundance of caution, the Plaintiff will seek to amend its pleadings to conform to the proof revealed during discovery. Clearly, the Defendant was on notice of these claims since it seeks to avoid them here and cannot claim surprise that these damages were being sought.

(1) the insured will continue to be 'entitled' disability benefits, and (2) the insurer will continue to deny those benefits") *Royal Maccabees Life Ins. Co. v. Choren*, 393 F.3d 1175, 1185 (10^{th} Cir. 2005) (holding that trial court has "broad discretion" in bad faith insurance cases, including potential award of future benefits given circumstances of case). *Kafie v. Northwestern Mut. Life Ins. Co.*, 2011 U.S. Dist. LEXIS 109849, p. 21-25, 2011 WL 4499051, the United States District Court for the southern district of Florida recognized the ability to recover such future damages in bad faith claims. See also, *Kafie v. Northwestern Mut. Life Ins. Co.*, 834 F.Supp.2d 1354, 1364, 2011 U.S. Dist. 138956.

As this Court did in finding the right to recover future damages, quoting *Nichols*: "Breach of this duty by an insurer's bad faith refusal to settle claims of its insured renders the insurer liable in tort for all consequential damages; actual damages are not limited by the contract". *Wright* 2001 U.S. Dist. LEXIS at 32-33 citing with approval *Nichols*, 306 S.E.2d at 618. (Emphasis added in *Wright*.) This Court determined South Carolina has not limited the rule in *Nichols* and "all consequential damages" includes damages for emotional distress and the present cash value of all future benefits that the insured is entitled to receive and punitive damages if the standard of proof and elements are met. This ruling allowing recovery for future insurance benefits is in contrast to Judge Norton's opinions stating otherwise resting on contract case law that pre-dated the recognition of the bad faith remedy as recognized by *Nichols* in 1983. [*Doe v. Northwestern Mut. Life Ins. Co.*, 2012 U.S. Dist. LEXIS 87813, 2012 WL 2405510; and, *Univ. Med. Assocs. Of the Med. Univ. of S.C. v. UNUM Provident*, 2004 U.S. Dist. LEXIS 31289][6] These cases, *Odiorne v. Prudential Ins. Co. of America*, 176 S.C. 69; 179 S.E. 669 (1935) and *O'Dell v. United Ins. Co. of America*, 243 S.C. 35; 132 S.E.2d 14 (1963), relied on contract law precedent that were in existence

[6] Judge Norton did agree that the emotional distress damages were recognized under a bad faith claim. See, *Doe v. Northwestern Mut. Life Ins. Co.*, 2012 U.S. Dist. LEXIS 87813, 2012 WL 2405510.

at that time. *Nichols* recognized the need for a tort remedy and South Carolina courts have followed *Nichols* since 1983 in order to deal with the inadequacies of the South Carolina contract law in seeking recovery on insurance contracts. The recognition of this right to future damages under a bad faith claim is further enhanced by the fact that the California court found the right to obtain such benefits in spite of earlier contract case law which limited recovery to only accrued benefits as specifically noted in *Egan*, supra.

Consequently, the rationale followed by this Court in noting the difference under bad faith law as well as noting the California precedent on allowing future benefits is correct. This Court's reasoning was followed in *Kafie*, supra. This analysis continues to be followed in California as had been specifically recognized in 1979 by *Egan*, supra.

B. Contract.

Under contract cases in South Carolina, there is precedent which would restrict the rights and liabilities of the parties up to the commencement of the claim. *Odiorne v. Prudential Inc. Co.*, supra., and *O'Dell v. United Ins. Co. of America*, supra. Both were contract cases decided in 1935 and 1963, respectively, did not and could not have taken the bad faith analysis into account recognized in 1983 and therefore do not prevent the recovery of future benefits in this case. This is especially so since the California court recognized similar contract cases did not prevent the recovery of future benefits in California. It should also be noted that there are a line of cases that would allow a more flexible approach to where an insurer wrongfully cancels, repudiates or terminates an insurance contract. *McLaughlin v. Brotherhood of Railroad Trainmen*, 216 S.C. 233, 57 S.E.2d 411 (1950) and *Glover v. North Carolina Life Ins. Co.*, 295 S.C. 251, 368 S.E.2d 68 (1988). The South Carolina Supreme Court noted an " … irreconcilable conflict in the decisions concerning the measure of damages for wrongfully cancellation or repudiation of a contract of insurance by the insurer." *McLaughlin*, 57 S.E.2d at 414. The Court went on the note that it has never undertaken to lay down an inflexible rule applicable to every situation. Specifically, the Court found: "The nature of the insurance involved, whether the insured is any longer an insurable risk, whether similar insurance in another reputable company is available, and various other factors must be considered." *McLaughlin v. Brotherhood of Railroad Trainmen*, 216 S.C. at 241-242, 57 S.E.2d at 414-415. The *McLaughlin* Court reasoned: "The dominate idea in formulating a rule of damages in any case should be the reimbursement of the insured for the actual loss sustained by him, and the measure of recovery which adheres most closely to that idea is the one that should be adopted." *Id.* In *McLaughlin*, the Court found that the recovery of all premiums paid plus the accrued dividends was payable to the Plaintiff since it had not been shown that the Plaintiff was an unacceptable risk to another insurer and therefore could obtain other insurance at that time.

In *Glover*, supra., the South Carolina Supreme Court specifically recognized that the repudiation or cancellation of an insurance policy differed and was clearly distinguishable from the facts found on *O'Dell v. United Ins. Co. of America*, supra., since *Glover* had alleged and proven repudiation of the policy by the insurance company. *Glover*, 295 S.C. at 256, 368 S.E.2d at 71.

Consequently, the more flexible analysis of the damages in a wrongful cancellation or repudiation of an insurance contract would allow the Plaintiff to recover the damages beyond the filing of the complaint.

By the weight of authority, where an insurer wrongfully cancels, repudiates, or terminates the contract on insurance, the insured may: (1) Elect to treat the policy as still in force and let the test of the validity of the cancellation or repudiation await until the policy is payable and sued on; (2) Sue in equity to set aside the cancellation and to have the policy declared to be valid and in force; or, (3) Maintain an action at law to recover damages for the wrongful cancellation or repudiation. *McLaughlin*, 216 S.C. at 240, 57 S.E.2d at 414.

As a result, South Carolina had already recognized a more flexible approach to damages in insurance contract cancellation or repudiation cases.

One commentator specifically questioned the reasoning that disability insurance and other contracts for the payment of installments for life, would be too speculative to award damages as the duration of the disability and the Plaintiffs life cannot be proved with absolute certainty. "While this is a plausible argument, such obstacles are routinely surmounted in tort cases and cases involving breach, anticipatory or otherwise, of executory bilateral contracts." J. Calamari and J. Perillo, *The Law of Contracts*, p. 292 (1970). Calamari and Perillo recognized that future damages are routinely awarded in contract cases. But see, 56 S.C. Law Rev. 779 "Bad Faith Refusal to Pay Disability Benefits: Should South Carolina Courts Permit Recovery of Future Policy Benefits?" [Student, Phoebe Norton Coddington, commenting on the split of authority in U.S. District Court between Judge Duffy and Judge Norton, and siding with Judge Norton.]

8. **The Plaintiff has suffered emotional trauma due to Defendant's actions.** (Response to Defendant's Memorandum in Support of Defendant's Motion for Summary Judgment Argument III.H.)

Expert testimony shows that Dr. Karnofsky has suffered emotionally due to the inability to get her disability payments. Clearly, Mass Mutual knew that the delay or failure to pay benefits on a disability claim will cause an insured emotional difficulties. Mass Mutual promoted its disability policies to provide peace of mind in knowing that there will be benefits to replace needed income to fund an insured's and family's life. Mass Mutual promotes these points by selling its disability policies and even tried to get its insureds to buy more – as it sends its statements to its insureds. [**EX. 20**] Yet, when it comes time to pay these benefits to fund the person's eventual life functions – it finds ways to delay, object and deny rightful benefits.

By doing so, it is understandable that its insureds would suffer emotionally. Mass Mutual sold these policies based on the insured's inability to perform one's own occupation.

Bad faith warrants the recovery of actual damages. The Fourth Circuit impliedly recognized that emotional distress damages related to the bad faith claims were reasonable in South Carolina. *St. Farm Fire and Cas. Co. v. Barton*, 897 F2d 729, 732-33 (4th Cir. 1990). South Carolina District Courts have recognized that emotional distress damages are recoverable in bad faith claims. See, *Wright*, supra., 2001 U.S. Dist. LEXIS 26069, p. 32-33, and *University Medical Associates of the Medical University of South Carolina v. UNUM*, supra. 335 F. Supp.2d at 711 and *Doe*, supra., 2012 U.S. Dist. LEXIS 87813, p. 27-28. Given Mass Mutual's marketing of its disability policies on the fears of not being able to work and not being able to provide for one's family necessarily foresees that the denial of rightful payments will likewise forcibly cause emotional distress.

In *Barton*, the Fourth Circuit found: "Additional evidence would be required to show that additional emotional distress, … was covered by appellant's bad faith denial of their claim." L. Randolf Waid, PhD. found that the disability insurance company caused Dr. Karnofsky severe emotional distress meeting the diagnostic criteria for depression and panic disorder (DSM 5 300.4 and 300.01.) [**EX. 31,** Dr. Waid Depo., p. 59-61 and **EX. 32**, Dr. Waid Report, p. 10-11 (portions redacted containing Personal Identifying Information and Sensitive Information-will be made available to the Court for *in camera* review if necessary)]. Dr. Waid concluded that Dr. Karnofsky's experience with the disability carrier and not receiving her disability benefits contributed significantly to the morbidity she was expressing, which was a high level of dysfunction. [**EX. 31**, Dr. Waid Depo., p. 60-61]. Dr. Waid's findings were set out in his report resulting from four evaluation sessions, a battery of psychological testing and Dr. Waid's educational background and experience as a licensed clinical psychologist. His findings were defended in a sworn deposition taken by the Defendant's counsel. [**EX. 31**, Dr. Waid Depo., p. 3-5, 7-27 and 30-79]. Dr. Waid elaborated on his finding that Dr. Karnofsky's lack of income as well as being the victim of an antagonistic relationship with the disability insurance carrier contributed significantly to the level of morbidity that she experienced:

> I believe in a series of events that started with the accident, that ultimately the relationship with MassMutual -- trying to get the disability benefits that she certainly believed that she deserved, filling out paperwork, you know, filing a complaint regarding the treatment that she had following -- … the complaint, not receiving any more -- having it cut off again, I think that -- nature of that relationship was antagonistic. And ultimately I believe the inability to somehow get the payments of a disability policy that she believed she rightfully had, added to her burdens in the course of the events that we're talking about. So I think they were a very significant impact on this woman. Certainly her plans for solvency, her plans for getting under some of the problems that she was confronting, certainly rested well on the idea that her disability income would be forthcoming."
>
> [**EX. 31,** Dr. Waid Depo., p. 59-60]

Dr. Waid continued:

> Q. Taking away all the other stressors, other than MassMutual, can you testify with a reasonable degree of psychological certainty that MassMutual caused her depression and anxiety?
>
> A. I have indicated to you that since that's an impossibility, that it -- it's my belief that MassMutual and their relationship and their lack of payment has contributed significantly to the level of morbidity that I saw in this lady when I saw her. And that level of morbidity or level of dysfunction is high. And so ultimately I think she would've been in much, much better shape without that experience, but it was not that she had not had some stressful experiences and mounting problems before that. The relationship, that failure to receive payment, that sense of bad faith that she has about the experience, contributed significantly to a person who may have been

> somewhat vulnerable already by the stressors, there's no doubt. But this was like -- you know, and the one that really broke the back, so to speak. She was kinda counting on this as some ways to maneuver out of this difficult situation she found in her life. So I think it was a very significant event.
>
> Q. But can you testify it's the sole cause of her depression and anxiety?
>
> A. I would not say that it's the sole cause. I think there's obviously life events that had already taken place that rendered her vulnerable, and therefore made this even more devastating for her.
>
> [**EX. 31**, Dr. Waid Depo., p. 60-61]

Dr. Waid observed that individuals seeking disability benefits have multiple problems. "And my sense is, most people who seek a disability income have some problems ongoing already, because that's why they're seeking. It might be medical, but when is – when does anybody seek a disability in -- a policy, that doesn't have some problems?" [**EX. 31**, Dr. Waid Depo., p. 62]. Mass Mutual knowing that its insureds are relying on it to provide needed income replacement apparently seek to be relieved from the emotional stress caused by its alleged bad faith actions because it did not "solely" cause an insured's emotional problems.

Here, Mass Mutual knew its insured's physical, mental and financial vulnerabilities and continued to withhold payments. There is no doubt that her emotional distress was severe. There is evidence to show that it was caused or at least aggravated or made worse by Mass Mutual's actions. If these actions are deemed to be bad faith, then a jury can decide whether the emotional trauma is due in whole or in part because of these actions and award damages accordingly. As Dr. Waid concluded, Dr. Karnofsky's dealings with Mass Mutual was the proverbial straw that broke the camel's back. [**EX. 31**, Dr. Waid Depo., p. 61]. It will be up to the Plaintiff to prove as much at trial.

The Defendant seeks to be relieved from any claim of emotional distress because it was not the **sole** cause of her distress. South Carolina has long recognized that the ability to seek emotional distress damages for willful or reckless conduct. The Defendant takes issue with Dr. Waid's opinion of emotional distress caused by the insurance company's failure to pay. It points out a variety of stressors in the insured's life. While not presenting any expert opinion of its own on this point, the record shows that there is evidence of emotional distress and that it was caused by the failure to get needed benefits to fund her and her family's life at a time she was disabled under her policy. At most, the Defendant can cross-examine the Plaintiff's psychologist to bring out any infirmities in his opinion. See, *Ford v. Hutson*, 276 SC 157, 167, 276 SE2d 776, 781 (1981). [Plaintiff's psychiatrist was cross-examined on facts Plaintiff deleted from the background given to psychiatrist which were material facts for an opinion and Defendant's psychiatrist experts stating an opposing opinion created a question for the jury to determine.]

There is evidence that the emotional distress arising after Dr. Karnofsky's interaction with the disability carrier caused her distress after September, 2011. "The Defendant takes the Plaintiff as he is found and the Plaintiff is entitled to recover damages resulting from aggravation of a pre-existing condition." *Raino v. Goodyear Tire & Rubber Co.*, 309 S.C. 255, 259, 422 S.E.2d 98, 100 (1992); *Burnett v. Family Kingdom, Inc.*, 387 S.C. 183, 193, 691 S.E.2d 170, 175 (Ct. App. 2009); and *Waring v. Johnson*, 341 S.C. 248, 260, 533 S.E.2d 906, 913 (Ct. App. 2000). [All three cases involve Plaintiffs with prior injuries or conditions that were at least aggravated or accelerated due to the motor vehicle accidents and were compensable damages .] See also, *Kilgore v. Reserve Life Ins. Co.*, 231 S.C. 111, 114-118, 97 S.E.2d 392, 393-396 (1957). [Disability insurance carrier's claim that insured's pre-existing arthritic condition caused disability and accident was not the sole cause of disability properly submitted to jury and verdict for insured upheld.]The evidence concerning emotional distress injury, when viewed in the proper light, especially when there is no contrary expert opinion, creates an issue for the jury to decide.

CONCLUSION

Sending private detectives to spy and accountants to pry, did nothing to evaluate Dr. Karnofsky's medical and functional capacities to perform the main duties of an Anesthesiologist on a regular and sustained basis. Ignoring Mass Mutual's own in house doctor's recommendation for an IME and FCE to allay any questions that the claims examiner may have had means there are no facts to support MM's suspicions that she could perform her occupation; or has or could earn an income that negates her right to disability payments, whether total or partial. This is especially true when Dr. Karnofsky was determined disabled for the purpose of receiving premium payment waivers from November 17, 2010 on. There are, at the very least, factual issues that warrant the denial of the Defendant's Motion for Summary Judgment and a trial on the merits.

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Respectfully submitted,

Dated: July 23, 2015

MCNAIR LAW FIRM, P.A.

By

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